IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1980 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ARIFABANU MEHMOOD SHABBIR WIFE OF DETENU SHABBIRR ALIAS

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1980 of 2001

MR RS SANJANWALA for Petitioner No. 1

MR KT DAVE AGP for Respondent No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 13/09/2001

ORAL JUDGEMENT

1. In exercise of the powers conferred under Section 3 (2) of the Gujarat Prevention of Antisocial Activities Act, 1985 ('the Act' for short), the District Magistrate, Bharuch, vide order dated February 13, 2001, Annexure A to the petition, detained the detenu - Shabbir Alias

Shabbo Mehmod Malek.

2. Averments made in the petition and the grounds of detention manifest that the detaining authority considered the detenu as a bootlegger within the meaning of section 2 (b) of the Act and as one case under the Bombay Prohibition Act is registered against the detenu which is still pending for trial and statements of three witnesses are recorded, according to the detaining authority, the activities of the detenu are prejudicial to the maintenance of public order and claiming privilege under Section 9 (2) of the Act by not disclosing the identity of the witnesses, the detaining authority detained the detenu.

3. By filing this petition under Article 226 of the Constitution, wife of the detenu has assailed the order of detention on various grounds and prayed to issue a writ of certiorari or any other appropriate writ, direction or order quashing and setting aside the impugned order of detention dated February 13, 2001 and to set the detenu at liberty forthwith.

4. Though the petitioner has challenged the order of detention on various grounds, Mr. Sanjanwala, learned advocate for the petitioner, has restricted his arguments only on the aspect of delay in recording the order of detention without recording satisfactory explanation on the part of the detaining authority and contended that the order of detention is vitiated. Besides this, it is submitted that the privilege claimed by the detaining authority under Section 9 (2) of the Act, by not disclosing the identity of the witnesses whose statements are recorded on January 6, 2001 and which are considered by the detaining authority, is not genuine. Apart from that the activities referred to in the statements of the witnesses are of the year 2000, and therefore, the order of detention which is based on the stale material disclosed by the witnesses, is vitiated. He therefore urged to quash and set aside the order of detention and to set the detenu at liberty.

5. Mr. K.T. Dave, learned AGP who appears on behalf of the respondents opposed the petition by making oral submissions though affidavit in reply is not filed. He however does not dispute the factual aspect of delay in passing the order of detention which is unexplained by the detaining authority. He however contended that the detaining authority has considered the statements of the witnesses and came to the conclusion that the fear expressed by the witnesses is correct and genuine and

therefore exercised the privilege under Section 9 (2) of the Act which cannot be called arbitrary or unjust. Therefore, on this ground, the order of detention sustains. He therefore urged to dismiss the petition.

6. I have considered the submissions advanced by the learned advocates for the parties. I have also perused the averments made in the petition and the documents annexed thereto and the impugned order of detention.

7. There is no manner of doubt that the only offence against the detenu is registered on October 15, 2000 whereas the order of detention came to be passed on February 13, 2001. Therefore, there is a delay of four months in passing the order of detention.

8. In the case of Anand Prakash v. State of UP, AIR 1990 SC 516, it has been held by the Supreme Court that stale material cannot be considered for detention and if satisfactory explanation is not given by the detaining authority for the delay in passing the impugned order of detention, the order of detention is vitiated. Similar view is expressed by this Court in Elesh N. Patel v. Commissioner of Police, 1997 (1) GLH 381.

9. Applying the principles enunciated by the Supreme Court and this Court in the aforesaid two judgments to the facts of the present case, there is no dispute that there is a delay of four months in passing the order of detention and, therefore, unexplained delay makes the grounds of detention not proximate and vitiates the order of detention itself.

10. So far as the statements of three witnesses which are recorded on January 6, 2001 are concerned, the detaining authority has claimed privilege under Section 9 (2) of the Act by not disclosing identity of the witnesses but in absence of reply affidavit of the detaining authority it cannot be considered that the detaining authority has rightly claimed the privilege. Therefore, on this ground also the order of detention is vitiated. Therefore, the petition deserves to be allowed.

11. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order of detention dated February 13, 2001 is quashed and set aside. The detenu Shabbir Alias Shabbo Mehmod Malek is ordered to be set at liberty forthwith if he is not required in connection with any other case. Rule is made absolute with no order as to costs. Direct service is

permitted.

(A.M. Kapadia, J.)

(karan)